84-1810

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ESTATE OF DAN B. CULL, Deceased,
WILLIAM J. CULL, Administrator,
and
CONNIE E. CULL, Surviving Spouse,
Petitioners,

versus

COMMISSIONER of INTERNAL REVENUE,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BENJAMIN F. FARAH
Counsel of Record
and
THOMAS J. ESCOVAR
55 Public Square
Suite 1828
Cleveland, Ohio 44113
(216) 771-8121
For the Petitioners

January 17, 1985

Question Presented For Review

Whether a taxpayer must, in all circumstances, always offer "goods or services" in order to be engaged in a "trade or business" within the meaning of 26 U.S.C. Sec. 62(1) for purposes of determining adjusted gross income, or whether the proper test for determining if a taxpayer is engaged in a "trade or business" is a review of all the "facts and circumstances" in each individual case.

List of All Parties

Estate of Dan B. Cull, Deceased
William J. Cull, Administrator
Connie E. Cull, Surviving Spouse

Petitioners

Commissioner of Internal Revenue

Respondent

Alice F. McDonald
Mr. & Mrs. Milton Gorlovsky
Mr. & Mrs. Joseph Visingardi

Amici Curiae in the Sixth
Circuit Court of Appeals
on Appeal from the Decision
of the Tax Court

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Reference to Opinion Below

The opinion of the Court of Appeals appears in the Appendix hereto at page 1. It was reported at 746 F.2d 1148.

Statement of Grounds on Which Jurisdiction is Invoked

The judgment of the Court of Appeals for the Sixth Circuit was entered on October 23, 1984, and this petition for certiorari was filed within ninety (90) days of that date.

Jurisdiction to review the judgment of the Court of Appeals in this case is conferred on this Court pursuant to 28 U.S.C. Sec. 1254(1).

Statutes and Rules

The pertinent portions of the Internal Revenue Code of 1954, 28 U.S.C. Sec. 1254(1), and Rule 13 of the Federal Rules of Appellate Procedure appear at pages 24-32 of the Appendix.

Statement of the Case

The facts of the case below appear in the Findings of Facts of the Tax Court, pages 11, 12, and 13 of the Appendix. In brief summary, the essential facts are as follows.

The Decedent, Dan B. Cull, and Petitioner, Connie E. Cull, jointly filed an original income tax return for the year 1977 and reported gambling winnings of the Decedent in the amount of Forty-Seven Thousand Nine Hundred Eight and 10/100 Dollars ($47,908.10), as a part of wages, salary or other compensation on the original Form 1040.

Later, Petitioner and Decedent filed an amended return on which they reported the $47,908.10 as gross receipts of a sole proprietorship and deducted the same amount

as trade and business losses pursuant to 26 U.S.C. Sec. 62(1) so as not to give rise to items of tax preference which were subject to a minimum tax under Sections 56 and 57 of the Internal Revenue Code.

In a statutory notice issued March 6, 1980, the Commissioner disallowed the use of a Schedule C for the reporting of Decedent's gambling winnings and losses. Petitioners filed a petition with the Tax Court for a redetermination of the deficiency pursuant to 26 U.S.C. Sec. 6213(a).

The Tax Court held that the gambling losses were attributable to a trade or business, and hence not subject to the minimum tax. The Commissioner filed a Notice of Appeal pursuant to 26 U.S.C. Sec. 7483 and Rule 13 of the Federal Rules

of Appellate Procedure.

The Court of Appeals for the Sixth Circuit reversed holding that the "facts and circumstances" approach "establishes factors to be considered before the application of a legal standard and [it] is not an alternative to [the "goods and services"] test." (Appendix at 8.)

Reasons for Granting the Writ

1. THE DECISION RENDERED BY THE COURT BELOW, AND THE DECISION RENDERED BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT, CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON THE SAME MATTER.

In Nipper v. Commissioner, Docket 4970-81, T.C., Memo 1983-644; 11th Circuit, Docket 84-3067, the U.S. Court of Appeals

for the Eleventh Circuit upheld the Tax Court holding that a full-time gambler whose sole means of support was his gambling winnings, "was in the trade or business of gambling within the meaning of Section 62(1)." T.C. Memo 1983-644. In Nipper, as in the instant case, the taxpayer did not hold himself out to others as offering "goods or services". Nevertheless, the Eleventh Circuit held him to be "in the trade or business of gambling". Nipper v. Commissioner, No. 84-3067 (11th Cir. filed Oct. 11, 1984).

As in the instant case, and directly in conflict with the decision of the Eleventh Circuit, the Second Circuit overturned the Tax Court in a case where the taxpayer's only income was from pari-mutuel wagering on jai-alai, and the

taxpayer deducted his entire net losses for each year as itemized deductions in arriving at his adjusted gross income. Gajewski v. Commissioner, No. 83-4121, slip op. (2nd Circuit), cert. denied, 105 S. Ct. 88, reh'g denied, 105 S. Ct. 549 (1984).

There, the Second Circuit held: "[I]n order to be classified as engaging in trade or business for the purposes of 26 U.S.C. Sec. 62(1) a taxpayer must, as a minimum, have held himself out to others as offering goods or services." Id. at 617.

An appeal on a similar matter is presently before the Seventh Circuit, Groetzinger v. Commissioner, 82 T.C. 61, 7th Circuit, Docket 84-2507. In Groetzinger, the Tax Court held, as it consistently has done in following its

decision in Ditunno v. Commissioner, 80 T.C. 362 (1983), that a full-time gambler for his own account, was in the trade or business of gambling. The Court further held that gambling losses, at least to the extent of gambling gains, were not items of tax preference for purposes of computing the minimum tax under Section 56, I.R.C., in effect for 1978.

Groetzinger was fully briefed on December 12, 1984, and will be set for oral argument before the Seventh Circuit some time in March or April of 1985.

Another gambling case raising the same issue recently decided by the Tax Court in favor of the taxpayer-petitioner, Barrish v. Commissioner, CCH Dec. 41, 616 (M), Docket Nos. 11020-81, 8746-82, November 20, 1984, T.C. Memo 1984-602, is appealable by

the Commissioner to the Tenth Circuit.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit which is in conflict with the judgment and opinion of the Eleventh Circuit on this matter.

2. THE DECISION RENDERED BY THE COURT BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS HONORABLE COURT.

"Trade" and "business" have been broadly referred to by this Court as any activity engaged in by a person. Flint v. Stone Tracy Co., 220 U.S. 107, 171 (1911).

More narrowly, ever since Higgins v. Commissioner, 312 U.S. 212 (1941), although for purposes of 26 U.S.C. 162, this

Honorable Court has used the "facts and circumstances" test, rejected by the Court below, to determine whether a taxpayer is engaged in a "trade or business".

The "facts and circumstances" test has been applied by this Honorable Court in other situations where the question of whether or not a taxpayer was "carrying on . . . trade or business" has arisen.

City Bank Farmers Trust Co. v. Helvering, 313 U.S. 121 (1941) involved a trustee of two testamentary trusts who sought to deduct expenses of managing the trusts as business expenses within Section 23(a) of the Revenue Act of 1928. Id., at 123. The issue was whether or not the trustee was "carrying on . . . business" within Section 23(a). This Honorable Court regarded Higgins as controlling and applied

the "facts and circumstances" test. Id., at 126.

Similarly, in U.S. v. Pyne, 313 U.S. 125 (1941), a companion case to City Bank Farmer's Trust, where the issue was whether executors were entitled to deduct expenses properly incurred in the administration of an estate as expenses incurred in "carrying on any trade or business", this Honorable Court specifically adopted the Higgins, test, Id., at 129, and reversed a Circuit Court holding because it had adopted and applied criteria inconsistent with Higgins. Id., at 132.

The "goods or services" test, relied on by the Commissioner and the Court below, derives from a concurring opinion by Justice Frankfurter in Deputy v. DuPont, 308 U.S. 448 (1940). However, in that case

the majority did not consider the meaning of "trade or business". Further, only one year after Deputy v. DuPont the same Court heard Higgins v. Commissioner and did not apply the "goods or services" test but instead adopted the "facts and circumstances" test. Notwithstanding the pronouncement of this Honorable Court, the Sixth Circuit Court of Appeals applied the "goods and services" test, and is thus in conflict with this Honorable Court.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit which is in conflict with applicable decisions of this Honorable Court.

3. EVEN IF THE SECOND, SIXTH AND ELEVENTH CIRCUITS DID NOT DISAGREE ON THIS

MATTER, THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS HONORABLE COURT.

There are approximately sixty (60) references in the Internal Revenue Code to the words "trade or business" and no definition of these words in the Code. Further, in the context of certain sections, particularly 26 U.S.C. 62 (1), there is virtually no case law interpretation of the words "trade or business". Tests used in one section are applied by analogy to others. For example, in Ditunno v. Commissioner, 80 T.C. 362 (1983) the Tax Court specifically allowed for the use of tests in the context of Section 162(a) to be used in the context of

Section 62(1).

However, such a practice is not always helpful or advisable as this Court observed in Snow v. Commissioner, 416 U.S. 500 (1974) while attempting to select a test to apply to "carrying on any trade or business" as used in 26 U.S.C. Sec. 174: "Those other sections are not helpful here because . . . Section 162(1) is more narrowly written than is Section 174". Id., at 503.

Taxpayers who are gamblers are not the only individuals who will be affected by a decision defining "trade or business" for purposes of determining adjusted gross income.

The Tax Court noted in Groetzinger v. Commissioner, 82 T.C. 61, Par. 82.61 P-H TC, 7th Circuit, Docket 84-2507: "[I]t is

now clear that an active [securities] 'trader' who looks to profit from short term swings and does not hold securities for long-term appreciation will be deemed to be engaged in a trade or business providing that his trading is frequent and substantial." Par. 82.61 P-H TC at 82-416.

A decision by this Honorable Court defining "trade or business" for purposes of determining adjusted gross income will also affect securities speculators and could have an effect on many other taxpayers including taxpayers who devote all their free time and financial resources to building and racing cars; fiduciaries of trusts and estates; individuals who devote all their free time and financial resources to research and experimentation; individuals who contract and are paid to render

consulting services but who actually render few, if any, such services.

For this reason also, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals which decision affects an indeterminable number of taxpayers other than strictly gamblers.

4. A RULING IN THIS CASE WILL ADD CONSISTENCY TO THE GENERAL BODY OF TAX LAW.

While the Internal Revenue Service has vigorously opposed the Tax Court decision in Cull, Ditunno, Gajewski, Nipper, and other similar cases, the service itself has relied on Ditunno when convenient. For example, in Hornaday v. Commissioner, 81 T.C. ____, No. 51 (CCH Dec. 40, 584 at 3390), the service relied heavily on

Ditunno in successfully arguing that a consultant with only one client was engaged in a trade or business for purposes of liability under the self-emloyment tax. Similarly, the service argued that the "facts and circumstances" test and not the "holding out" test should be employed in another consulting case, Steffens v. Commissioner, 707 F. 2d 478 (11th Cir., 1983).

The question of what is the proper test is an important federal question. The fair and just application of our tax laws require consistency and uniformity in approach. Consistency and uniformity is not achieved when the Commissioner is allowed to apply one test or the other as he finds nice or convenient.

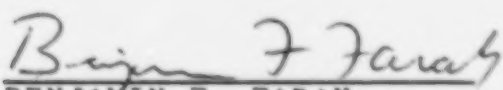
Conclusion

Essentially four (4) reasons exist why a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit: (1) the judgment and opinion of the Sixth Circuit in the instant case conflicts with the judgment and opinion of the Eleventh Circuit in a case in which the facts are nearly identical to the facts of the instant case; (2) the judgment and opinion of the Sixth Circuit in the instant case conflicts with applicable judgments and decisions of this Honorable Court; (3) the question presented is an important question of federal law which has ramifications for an indeterminable number of taxpayers and which has not been, but should be, settled by this Honorable

Court; (4) a ruling by this Honorable Court in this case will add consistency to the general body of tax law and allow for a fair and just application of those laws.

It is therefore requested that this Honorable Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,



BENJAMIN F. FARAH
Counsel of Record
and
THOMAS J. ESCOVAR
55 Public Square
Suite 1828
Cleveland, Ohio 44113
Phone: (216) 771-8121

Counsel for Petitioners

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BENJAMIN F. FARAH
Counsel of Record
and
THOMAS J. ESCOVAR
55 Public Square
Suite 1828
Cleveland, Ohio 44113
(216) 771-8121
For the Petitioners

January 17, 1985

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-1601

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ESTATE OF DAN B. CULL, DECEASED, WILLIAM J. CULL, ADMINISTRATOR, and CONNIE E. CULL, SURVIVING SPOUSE, *Petitioners-Appellees*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellant*.	ON APPEAL from the United States Tax Court.

Decided and Filed October 23, 1984

Before: KEITH and JONES, Circuit Judges, and BALLANTINE, District Judge.*

KEITH, Circuit Judge. This is an appeal by the Commissioner of Internal Revenue, pursuant to 26 U.S.C. § 7482, from a decision of the United States Tax Court. The issue presented is whether a full-time gambler for his own account can be engaged in a "trade or business" within the meaning of 26

* Honorable Thomas A. Ballantine, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

U.S.C. § 62(1) for the purpose of determining adjusted gross income[1] even though he offers no goods or services to others. Petitioner-appellee contended that Dan Cull could deduct his net gambling losses for purposes of arriving at his adjusted gross income subject to tax, regardless of whether these losses exceeded his winnings. In so doing, Mr. Cull could avoid a minimum tax that would otherwise be due on excess itemized deductions pursuant to 26 U.S.C. § 56(a).[2] The tax court held in favor of the estate of Dan B. Cull. We reverse.

I.
FACTS

During 1977 the decedent, Dan B. Cull, was employed full time as a pari-mutuel clerk at various racetracks in northern Ohio. Cull was a habitual gambler who placed wagers almost daily. He and his wife, Connie E. Cull, received income totalling $17,670.67 during 1977, from sources other than Mr. Cull's gambling winnings.

---

[1] Title 26 U.S.C. § 62(1) provides:

> "Sec. 62. **Adjusted Gross Income Defined.**
> "For purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions:
>
> (1) **Trade and business deductions.** — The deductions allowed by this chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee."

[2] Title 26 U.S.C. § 56 provides:

> "Sec. 56 **Imposition of Tax.**
> (a) **General Rule.** — In addition to the other taxes imposed by this chapter, there is hereby imposed for each taxable year, with respect to the income of every person, a tax equal to 15 percent of the amount by which the sum of the items of tax preference exceeds the greater of —
>
> (1) $10,000, or
>
> (2) the regular tax deduction for the taxable year (as determined under subsection (c))."

When Mr. Cull was not working as a pari-mutuel clerk, he gathered information for the purpose of placing bets. He often arrived at the race track as early as 6:00 a.m. in order to question owners, trainers and jockeys. Near the end of 1977, he took a number of days off from his regular clerk job in order to devote his entire day to betting.

Mr. Cull only gambled with his own money on his own account. He did not place bets on behalf of others or quote odds on any race in 1977.

Mr. Cull maintained a detailed ledger in which he recorded the amount wagered on each race. In the ledger, the "won" column listed the amounts by which the receipts from a particular race exceeded the amount of the wagers on that race. The "loss" column listed the amounts by which the wagers on a particular race exceeded the receipts from that race. The ledger tabulated winnings and losses on a daily basis, ultimately arriving at a daily net won-or-loss figure. Computed on this basis, Mr. Cull had $56,694.40 of net winnings on winning days and $74,926.90 of net losses on losing days. Addition of all entries in the "won" column results in a total amount of $130,411. These winnings were more than offset by gambling losses for the year.

Dan and Connie Cull were married throughout 1977. They filed a joint federal income tax return for that year and reported $47,908.10 of gambling winnings as wages or other compensation and 47,908.10 of gambling losses as an itemized deduction.

They subsequently filed an amended 1977 return in which they reported the $47,908.10 of gambling winnings as gross receipts of a sole proprietorship and deducted the same amount as gambling losses. Mr. Cull died in 1979.

The Commissioner determined that Mr. Cull received total gambling winnings of $130,411 and that only $130,411 of the aforementioned gambling losses were deductible. The Commissioner further determined that the deduction for gambling losses was not attributable to a trade or business. The de-

duction was therefore not allowable in determining adjusted gross income under Section 62(1). Rather, it was an itemized deduction. A portion of those deductions was treated as items of tax preference subject to the minimum tax imposed by Section 56 of the Internal Revenue Code. Accordingly, the Commissioner asserted a deficiency in federal income tax against the estate of Dan B. Cull for the taxable year 1977 in the amount of $6,286.81. The estate, through its administrator, William J. Cull, and the surviving spouse, Connie E. Cull, filed a petition in the tax court for redetermination of the deficiency.

The estate argued that Mr. Cull was carrying on a trade or business as a professional gambler, and that therefore his gambling losses did not give rise to items of tax preference subject to the minimum tax. The estate also argued that the Commissioner had incorrectly determined the amount of Mr. Cull's 1977 gambling losses, so that even if Mr. Cull were not carrying on a trade or business, the Commissioner had incorrectly determined the amount of the minimum tax.

The Commissioner relied on *Gentile* v. *Commissioner*, 65 T.C. 1 (1975), which defined "carrying on a trade or business" as holding oneself out to others as engaged in the selling of goods or services. In *Gentile*, the court held that a gambler betting solely on his own account was not carrying on a trade or business. While the instant case was pending, the tax court, in *Ditunno* v. *Commissioner*, 80 T.C. 362 (1983), overruled *Gentile* and rejected the "trade or business" standard in favor of a "facts and circumstances" test. In *Ditunno*, which also involved the application of the minimum tax to a gambler, the court concluded that the taxpayer was an active gambler in the trade or business of gambling.

In the instant case, the tax court found that Mr. Cull was an active, professional gambler who devoted substantial time and energy to his gambling activities and that under *Ditunno*, he was in a trade or business. Therefore, Mr. Cull's gambling losses were deducted in determining gross income under

Section 62(1), he had no items of tax preference, and he was not subject to the minimum tax. Accordingly on June 1, 1983, the tax court entered a decision that determined a deficiency of only $8.00. Since the tax court held that Mr. Cull's gambling losses were not items of tax preference, it did not reach the issue of whether the Commissioner had properly determined the amount of those losses. This appeal followed.

II.

DISCUSSION

An accurate definition of the phrase "carrying on a trade or business" is essential to the disposition of this case. Because neither "trade" nor "business" is defined in the Internal Revenue Code or in the Treasury Regulations, defining the phrase has been left to the judiciary. In *Deputy* v. *duPont*, 308 U.S. 488 (1940), the Supreme Court held that costs resulting from a short sale of stock by shareholders to raise capital for a financially troubled corporation that was legally unable to act were not deductible in computing the shareholders' income. The Court reached this result because the costs resulted from the taxpayers' business rather than that of the corporation and were neither "ordinary" nor "necessary" business expenses. In concurring with the result, Justice Frankfurter defined trade or business in order to show that the stockholders' activities did not fit within the meaning of the term: "carrying on any trade or business, within the contemplation of § 23(a) [precursor to Section 62(1)], involves holding one's self out to others as engaged in the selling of goods or services. This the taxpayer did not do." *Id.* at 499. (Franfurter, J., concurring).

The continuing importance of this definition is demonstrated by an examination of the leading relevant cases. In *Gentile* v. *Commissioner*, 65 T.C. 1 (1975), the court decided that the "[p]etitioner's gambling winnings were not derived from the carrying on of any trade or business" because, as petitioner

asserted, "he neither provided nor held himself out as a provider of any goods or services to any other person." *Id.* at 3. The requirement of holding one's self out to others has been applied by the circuit courts in other similar circumstances. In a leading case involving the characterization of personal investing, the Second Circuit held that "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business." *Higgins* v. *Commissioner*, 111 F.2d 795, 796 (2d Cir. 1940), *aff'd*, 312 U.S. 212 (1941). The unifying principle is that involvement in any profitable activity using only personal funds for one's private benefit, without offering the services to others, does not constitute participation in a trade or business.

Appellees assert that in affirming *Higgins*, the Supreme Court set forth a "facts and circumstances" test to determine if activities constitute "carrying on a business." In *Higgins*, the Court stated:

> To determine whether the activities of a taxpayer are "carrying on a business" requires an examination of the facts in each case. As the [Second] Circuit Court of Appeals observed [below], all expenses of every business transaction are not deductible. Only those are deductible which relate to carrying on a business. The Bureau of Internal Revenue has this duty of determining what is carrying on a business, subject to reexamination of the facts by the Board of Tax Appeals and ultimately to review on the law by the courts on which jurisdiction is conferred.

Higgins v. *Commissioner*, 312 U.S. at 217-18.

This language, which appellees believe states a legal standard, more appropriately establishes factors to be considered before the application of a legal standard and is not an alternative to Justice Frankfurter's holding out test. It is not

enough to say that whether a person is engaged in a trade or business is a question of facts or circumstances. The crucial question is *what* facts or circumstances are necessary to the determination that a taxpayer is engaged in a trade or business. That is to say, the 'facts and circumstances' approach describes a predicate for application of a legal test rather than a legal standard. *Gajewski* v. *Commissioner*, 723 F.2d 1062, 1066 (2d Cir. 1983).

This being the case, the two standards are clearly in concert. *Higgins* stands for the proposition that determining whether one is involved in a trade or business is a question of fact while the Frankfurter concurrence in *duPont*, sets forth a minimum standard for establishing taxpayers' involvement in a trade or business. The following courts have established a number of other facts to be considered in making these determinations. *See Stanton* v. *Commissioner*, 399 F.2d 326, 329-30 (5th Cir. 1968); *McDowell* v. *Ribicoff*, 292 F.2d 174, 178 (3d Cir.), *cert. denied*, 368 U.S. 919, (1961) (considering whether or not taxpayer's efforts were marked by continuity and regularity essential to involvement in a trade or business); *Daily Journal Co.* v. *Commissioner*, 135 F.2d 687, 688 (9th Cir. 1943); *Bassenvey* v. *Commissioner*, 379 F.2d 252, 255-56 (2d Cir.), *cert. denied*, 389 U.S. 931, 88 S.Ct. 193, 19 L.Ed. 2d 183 (1967) (considering whether or not the taxpayer intends to make a profit).

The "facts and circumstances" test was cited in the recent tax court case that overruled *Gentile*, thus making the "holding out" test inapplicable to cases such as this one. *Ditunno* v. *Commissioner*, 80 T.C. 362 (1983). The *Ditunno* court found Justice Frankfurter's "holding out" test too restrictive and inappropriate because the majority in *duPont* issued its ruling without considering the meaning of "trade or business." The *Ditunno* court ignores the impact of the definition in Justice Frankfurter's concurrence. In determining if one is carrying on a "trade or business," the most basic requirement has remained that of "holding one's self out to others as engaged in the

selling of goods or services." *Deputy* v. *duPont*, 308 U.S. at 499. The continued vitality and importance of this view has been acknowledged in a number of circumstances. *See, e.g., Snow* v. *Commissioner*, 416 U.S. 500 (1974) (using Justice Frankfurter's definition of 'trade or business' as the standard for comparing Section 162 with Section 174). Similarly, the Second Circuit considers the "goods or services" requirement to be part of the law. *Grosswald* v. *Schweiker*, 653 F.2d 58 (2d Cir. 1981). The importance of the "goods and services" test was also stated in the dissent to *Ditunno*, where Chief Judge Tannenwald stated: "I know of no case (and my research has not produced any) where a taxpayer did not deal with third parties, i.e., hold himself out, and was nevertheless found to be carrying on a trade or business." *Ditunno* v. *Commissioner*, 80 T.C. at 374; *see also Gajeyski* v. *Commissioner*, 723 F.2d at 1067 (interpreting *Higgins* as not implying that a person who fails to publicly offer goods or services could be carrying on a trade or business). The importance of the test is such that the Second Circuit has called it the minimum standard for determining whether a taxpayer is engaged in a trade or business. *Gajewski* v. *Commissioner*, 723 F.2d at 1066.

Given the above discussion, it is clear that Dan Cull's failure to hold himself out to others as a gambler precluded him from being engaged in a trade or business within the meaning of Section 62(1). Accordingly, the ruling of the tax court is hereby reversed and the previous findings of the Commissioner that Mr. Cull's gambling losses were items of tax preference subject to tax preference is restored. The case is also remanded for trial on the issue of whether the Commissioner properly determined the amount of gambling losses.

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

No. 83-1601

ESTATE OF DAN B. CULL, Deceased, WILLIAM J. CULL, Administrator, AND CONNIE E. CULL, Suriving Spouse

Petitioners-Appellees,

vs.

COMMISSIONER of INTERNAL REVENUE,

Respondent-Appellant.

Before: KEITH and JONES, Circuit Judges; and BALLANTINE, District Judge

J U D G M E N T

ON APPEAL from a decision of the Tax Court of the United States.

THIS CAUSE came on to be heard on the transcript of record from the said Tax Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed and the case is remanded consistent with this opinion.

Each party is to bear its own costs on Appeal.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: November 14, 1984

A True Copy

COSTS: NONE

Attest:

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/s/
Deputy Clerk

T. C. Memo. 1983-80

UNITED STATES TAX COURT

ESTATE OF DAN B. CULL, Deceased, WILLIAM J. CULL, Administrator, and CONNIE E. CULL, Surviving Spouse, PETITIONERS v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 7608-80 Filed 2/8/83.

During 1977, decedent was employed as a pari-mutuel clerk at various racetracks in northern Ohio. He also was a habitual gambler who placed wagers almost daily in 1977. Petitioners elicited uncontradicted testimony that decedent was a "professional gambler" who devoted substantial time and energy to his gambling activities. Held, decedent was in the separate trade or business of gambling in 1977. Accordingly, the gambling losses incurred by

him and used to offset gambling winnings do not constitute items of tax preference. Ditunno v. Commissioner, 80 T.C. _____(Feb. 7, 1983), followed.

Gerald A. Berk, Thomas J. Escovar and Benjamin F. Farah, for the petitioners.

Kristine A. Roth, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

STERRETT, Judge: By notice of deficiency dated March 6, 1980, respondent determined a deficiency in petitioners' Federal income tax for the taxable year 1977 in the amount of $6,286.81. After concessions, the issues for decision are (1) whether Dan B. Cull was in the trade or business of professional gambling; and, if not, (2) whether respondent correctly determined the amount of minimum tax attributable to the excess itemized deductions generated by Mr. Cull's gambling activities.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts and exhibits attached thereto are incorporated herein by this reference.

William J. Cull, administrator for the Estate of Dan B. Cull, a petitioner

herein, resided in Madison, Ohio at the time of filing the petition herein. Petitioner, Connie Cull, surviving spouse of Dan B. Cull, resided in Aurora, Ohio at the time of filing the petition herein. Decedent, Dan B. Cull (hereinafter decedent) and petitioner Connie Cull were married during 1977 and they filed a joint Federal income tax return for that year with the Internal Revenue Service Center, Cincinnati, Ohio. An amended return was filed with the Cincinnati Service Center on May 25, 1978, on which the Culls reported as gross receipts of a sole proprietorship gambling winnings in the amount of $47,908.10, which previously had been reported as wages or salary or other compensation on their original Form 1040. Petitioners deducted the same amount as gambling losses.

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During 1977, decedent was employed full time as a pari-mutuel clerk at various racetracks in northern Ohio. He and his wife received income other than from Mr. Cull's gambling in the year 1977 from the following sources and in the following amounts:

Source of payments	Amount
Grandview Raceway	$ 3,616.00
Painesville Raceway	3,168.00
Summit Racing Club, Inc.	2,044.00
Cranwood Racing Club, Inc.	1,207.00
Thistledown Racing Club, Inc.	2,341.00
Randall Racing Club, Inc.	2,982.00
Northfield Park Associates	5,605.00
Interest income	101.96
Dividends	27.09
Income from rental property	(2,278.33)
Farm Income	(743.05)
Sale of Horse	(400.00)
Total	$ 17,670.67

Decedent was a habitual gambler who placed wagers almost daily in 1977. When he was not working at his job, he gathered information for purposes of placing bets. He often arrived at the racetrack as early as 6 o'clock in the morning in order to question owners, trainers and jockeys. Near the end of the year, decedent took a number of days off from his regular job as a pari-mutuel clerk in order to devote his entire day to betting for his own account. Decedent only bet with his own money; he did not place bets on behalf of others or quote odds for any race during 1977.

Decedent maintained a detailed ledger in which he recorded the amount wagered on each race. In the ledger, the column "won" listed the amounts by which the receipts for each race exceeded the

amount of the wagers for each race. The entries in the column marked "lost" were the amounts by which the wagers for a particular race exceeded the receipts of that race. The ledger tabulated winnings and losses on a per-day basis, ultimately arriving at a daily net won-or-loss figure. Computed on this basis, decedent had $56,694.40 of net winnings on winning days and $74,926.90 of net losses on losing days. Respondent, in his notice of deficiency, calculated total winnings by adding all entries in the "won" column of decedent's ledger to arrive at a total amount of $130,411. These winnings were more than offset by gambling losses for the year.

OPINION

The first issue we address is whether decedent was engaged in the trade or business of gambling during the year in question. If so, the gambling losses incurred by him and used to offset gambling winnings would not constitute items of tax preference.[1] If not, the utilized gambling losses would constitute items of tax preference.[2]

---

[1]As the law stood in 1977, Sec. 57(a)(1), I.R.C. 1954, provided that "adjusted itemized deductions" constituted items of tax preference. The phrase "adjusted itemized deductions" was defined as the amount by which the sum of the deductions for the taxable year, with certain exceptions, exceeded 60 percent of the taxpayer's adjusted gross income for the taxable year.

Sec. 57(b)(1). Excepted from the deductions added into this formula were "deductions allowable in arriving at adjusted gross income". Sec. 57(b)(1)(A). Sec. 62 (1) provides that deduc-

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tions attributable to a trade or business carried on by the taxpayer constitute deductions allowable in reaching adjusted gross income. Thus, if petitioner was in the trade or business of gambling, his gambling losses would not constitute items of tax preference.

[2]This is because such losses are deductible pursuant to Sec. 165(d), and, therefore, because the resultant deductions were not excluded from the definition of adjusted itemized deductions under Sec. 57(b)(1), they constituted items of tax preference within Sec. 57(a)(1).

For taxable years beginning after December 31, 1982, individuals are no longer subject to the minimum tax under Sec. 56 though they are subject to the alternative minimum tax imposed pursuant to Sec. 55. However, under the newly expanded version of Sec. 55, deductible gambling losses do not have the effect of increasing an individual's alternative minimum tax. See Sec. 55(b)(1)(B) and sec. 55(e)(1)(A).

In Gentile v. Commissioner, 65 T.C. 1 (1975), we similarly were faced with the issue of whether a taxpayer's gambling activities constituted a trade or business. We held that one must hold oneself out to others as offering goods or services in order to be engaged in a trade or business. Gentile v. Commissioner, supra at 5-6.

Petitioners request us to reexamine our position in Gentile. Respondent, on the other hand, relies entirely upon the proposition that a gambler who does not offer goods or services to others is not in the trade of business or gambling.

In Ditunno v. Commissioner, 80 T.C. ____(Feb. 7, 1983), recently decided by this Court, we held that the goods or services test applied in Gentile was overly restrictive, and that a proper analysis must rest on the facts and

circumstances of each case. In determining whether a gambler who bet solely on his own account was in a trade or business, we looked to the character of his gambling activities, finding that they were sufficiently "active" to elevate them to trade or business status.

On brief, respondent relies upon the continuing vitality of the goods or services test as applied in Gentile v. Commissioner, supra. He did not refute petitioners' contention that decedent was a "professional gambler" who devoted substantial time and energy to his gambling activities. In effect, respondent made no attempt to contradict the testimony of petitioners' witness that decedent was an "active" gambler. Accordingly, based upon this uncontradicted testimony, we hold that decedent

was in the separate trade or business of gambling during 1977.[3] Due to our holding, we need not reach the second issue in this case.

To reflect the foregoing,

Decision will be entered under Rule 155.

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[3] A taxpayer may be engaged in more than one trade or business. See Curphey v. Commissioner, 73 T.C. 766, 775-776 (1980), on appeal (9th Cir., November 24, 1980).

UNITED STATES TAX COURT

ESTATE OF DAN B. CULL, Deceased WILLIAM J. CULL, Administrator, and CONNIE E. CULL, Surviving Spouse	)	
Petitioners,	)	Docket No.
vs.	)	7608-80
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

DECISION

Pursuant to the opinion of the Court filed February 8, 1983, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1977 in the amount of $8.00.

Judge

Entered: June 1, 1983

* * * * * *

UNITED STATES TAX COURT

ESTATE OF DAN B. CULL, Deceased WILLIAM J. CULL, Administrator, and CONNIE E. CULL, Surviving Spouse	)	
Petitioners	)	Docket No.
vs.	)	7608-80
COMMISSIONER OF INTERNAL REVENUE	)	
Respondent	)	

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted on behalf of the respondent, in compliance with the Court's opinion determining the issues in this case, together with a proposed decision which is being lodged concurrently with said computation.

This computation is submitted without prejudice to respondent's rights to contest the correctness of the decision entered herein by the Court.

KENNETH W. GIDEON
Chief Counsel
Internal Revenue Service

_____ By: _____
Date JACK E. PRESTRUD
Assistant District
Counsel

OF COUNSEL:

VERNON J. OWENS, Regional Counsel
CAROL A. SZCZEPANIK, Attorney
Internal Revenue Service
605 BancOhio Building
1404 East Ninth Street
Cleveland, Ohio 44114
Tel. No. 216-522-3380/FTS 293-3380

Docket No. 7608-80

Without prejudice to the right of appeal, it is agreed that the attached computation is in accordance with the opinion of the Tax Court in the above-entitled case.

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Date	/s/ Gerald A. Berk GERALD A. BERK
	THOMAS J. ESCOVAR Counsel for Petitioners Steuer, Escovar & Berk Co., L.P.A. The Illuminating Building 55 Public Square, 18 Floor Cleveland, Ohio 44114 Tel. No. (216) 771-8121

COMPUTATION STATEMENT

In re: Estate of Dan B. Cull, Deceased
William J. Cull, Administrator
6233 Shore Drive
Madison, Ohio 44057

and

Connie E. Cull, Surviving Spouse
236 Eldridge Road
Aurora, Ohio 44202

Docket No. 7608-80

Income Tax

Year	Deficiency
1977	$8.00

The details supporting the above computation are set forth on attached page 2.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 56. IMPOSITION OF TAX.

(a) General Rule. - In addition to the other taxes imposed by this chapter, there is hereby imposed for each taxable year, with respect to the income of every person, a tax equal to 15 percent of the amount by which the sum of the items of tax preference exceeds the greater of --

(1) $10,000.00 or

(2) the regular tax deduction for the taxable year (as determined under subsection (c)).

SEC. 57. ITEMS OF TAX PREFERENCE.

(a) IN GENERAL. - For purposes of this part the items of tax preference are --

(1) Adjusted itemized deductions. In the case of an individual, an amount equal to the adjusted itemized deductions for the taxable year (as determined under subsection (b)).

(b) ADJUSTED ITEMIZED DEDUCTIONS. --

(1) In general. -- For purposes of paragraph (1) of subsection (a), the amount of the adjusted itemized deductions for any taxable year is the amount by which the sum of the deductions for the taxable year other than --

(A) deductions allowable in arriving at adjusted gross income,

(B) the deduction for personal exemptions provided by section 151,

(C) the deduction for medical, dental, etc., expenses provided by section 213,

(D) the deduction allowable under section 691 (c), exceeds 60 percent (but does not exceed 100 percent) of the taxpayer's adjusted gross income for the taxable year.

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For the purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

(1) Trade and business deductions. -- The deductions allowed by this Chapter (other than by part VII of this subchapter) which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee.

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) IN GENERAL. -- There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . .

SEC. 174. RESEARCH AND EXPERIMENTAL EXPENDITURES.

(a) TREATMENT AS EXPENSES. --

(1) In General. -- A taxpayer may treat research or experimental expenditures which are paid or incurred by him during the taxable year in connection with his trade or business as expenses which are not chargeable to capital account. The expenditures so treated shall be allowed as a deduction.

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) TIME FOR FILING PETITION AND RESTRICTION ON ASSESSMENT. - Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficieny. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor

until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

SEC. 7483. NOTICE OF APPEAL.

Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

28 U.S.C. SEC. 1254. COURTS OF APPEALS; CERTIORARI; APPEAL; CERTIFIED QUESTIONS.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any part to any civil or criminal case, before or after rendition of judgment or decree.

RULE 13. REVIEW OF DECISIONS OF THE TAX COURT

(a) HOW OBTAINED; TIME FOR FILING NOTICE OF APPEAL. Review of a decision of the United States Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry

of decision, whichever is later.

(b) NOTICE OF APPEAL - HOW FILED. The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of Sec. 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.

(3)

No. 84-1310

Office - Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ESTATE OF DAN B. CULL, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

JONATHAN S. COHEN
BRUCE R. ELLISEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15 pp

QUESTION PRESENTED

Whether the decedent's gambling activities constituted a "trade or business carried on by [him]" (26 U.S.C. (1976 ed.) 62(1)) for purposes of the minimum tax on tax preferences formerly imposed by 26 U.S.C. (1976 ed.) 56 and 57.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1310

ESTATE OF DAN B. CULL, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 746 F.2d 1148. The memorandum of the Tax Court (Pet. App. 10-16) is reported at 45 T.C.M. (CCH) 691.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1984 (Pet. App. 9). The petition for a writ of certiorari was filed on January 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1977, Dan B. Cull, now deceased,[1] was employed full time as a pari-mutuel clerk at various race tracks in northern Ohio (Pet. App. 12). He earned wages

[1]Petitioners are the decedent's surviving spouse, with whom he filed a joint federal income tax return for 1977, and the executor of his estate.

aggregating about $21,000 from those jobs (*ibid.*). He was also a habitual gambler. He devoted substantial time and energy to his race track gambling and placed wagers almost daily (*ibid.*). He bet solely for his own account and did not place bets on behalf of others or quote odds on any race (*id.* at 12-13). He incurred gambling losses in excess of his gambling winnings in 1977 (*id.* at 13).

Section 56(a) of the Internal Revenue Code, as it existed in 1977, imposed a minimum tax on persons whose "items of tax preference" exceeded certain amounts (26 U.S.C. (1976 ed.) 56(a)). Section 57(a)(1) defined "items of tax preference" to include "adjusted itemized deductions" (26 U.S.C. (Supp. I 1977) 57(a)(1)). Gambling losses (to the extent of gambling gains) are generally itemized deductions. 26 U.S.C. 63(f), 165(d). Under Section 57(b)(1)(A), however, "adjusted itemized deductions" for minimum tax purposes were defined to exclude "deductions allowable in arriving at adjusted gross income" (26 U.S.C. (Supp. I 1977) 57(b)(1)(A)). Section 62(1) in turn provided that the latter sort of deductions — often called "above the line" deductions — include deductions "attributable to a trade or business carried on by the taxpayer" (26 U.S.C. (1976 ed.) 62(1)).

The Commissioner determined that the decedent was not engaged in the "trade or business" of gambling, and hence that his gambling losses were not deductions of the type described in Section 62(1). In so concluding, the Commissioner cited *Gentile* v. *Commissioner*, 65 T.C. 1 (1975), which held that a taxpayer who gambles solely for his own account is not in a "trade or business" because he does not hold himself out to others " 'as engaged in the selling of goods or services' " (65 T.C. at 5, quoting *Deputy* v. *du Pont*, 308 U.S. 488, 499 (1940) (Frankfurter, J., concurring)). Based on this conclusion, the Commissioner determined that some of the decedent's gambling losses were

"adjusted itemized deductions," that those deductions were "items of tax preference," and the decedent was therefore liable for minimum tax.

Petitioners sought redetermination of the resulting deficiency in the Tax Court. While their petition was pending, the Tax Court overruled *Gentile* in *Ditunno* v. *Commissioner*, 80 T.C. 362 (1983), a case, like *Gentile*, involving the trade-or-business status of a full-time gambler. In *Ditunno*, the majority[2] noted that, under *Higgins* v. *Commissioner*, 312 U.S. 212 (1941), "[t]he proper test of whether an individual is carrying on a trade or business requires an examination of all the facts involved in each case" (80 T.C. at 366-367 (emphasis omitted)). Under this "facts and circumstances test," the *Ditunno* court reasoned, the "failure to provide or offer goods and services [should] not [be] sufficient by itself to find that a taxpayer is not carrying on a trade or business" (80 T.C. at 370 (footnote omitted)). The *Ditunno* Court accordingly concluded that the gambler's failure to offer goods or services to others was not dispositive, and that he was engaged in a "trade or business" for minimum tax purposes by virtue of the frequency and regularity of his gambling activities (80 T.C. at 371-372).

In the instant case, the Tax Court found that the decedent was "an 'active' gambler" who "devoted substantial time and energy to his gambling activities" (Pet. App. 15-16). Following its reasoning in *Ditunno*, the court accordingly held that, besides being in the trade or business of a parimutuel clerk, the decedent was also "in the separate trade or business of gambling" (Pet. App. 16). His gambling losses thus were not "items of tax preference" subject to minimum tax (*ibid.*).

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[2]Judge Tannenwald, the author of *Gentile*, dissented, joined by three other judges (80 T.C. at 372-377). The Commissioner was precluded from appealing the adverse decision in *Ditunno* because of a procedural problem.

The Sixth Circuit unanimously reversed (Pet. App. 1-8). It noted that the courts of appeals (like the Tax Court before *Ditunno*) have typically regarded the offer of goods or services as a prerequisite to being in a "trade or business" for tax purposes (Pet. App. 6, 8 (citing cases)). And it agreed with the view expressed by the Second Circuit in *Gajewski* v. *Commissioner*, 723 F.2d 1062, 1066-1067 (1983), cert. denied, No. 83-1715 (Oct. 1, 1984) — a case involving the trade-or-business status of a full-time gambler — that the goods-or-services requirement is an appropriate "minimum standard for determining whether a taxpayer is engaged in a trade or business" (Pet. App. 8). Since the decedent in the instant case gambled only for his own account and offered no goods or services to others, the court of appeals held that his gambling activities did not amount to a "trade or business" and that his gambling losses were thus items of tax preference subject to minimum tax (*ibid.*).

ARGUMENT

The decision below is correct. Although it conflicts with an unpublished decision of the Eleventh Circuit, the law in the courts of appeals is not sufficiently developed, and the question presented is not sufficiently important, to warrant review by this Court at this time.

1. The court of appeals correctly held that the decedent was not engaged in a "trade or business" because he did not offer goods or services to others. The phrase "trade or business," while appearing frequently in the Internal Revenue Code,[3] is defined neither in the Code nor in the regulations, and the courts have thus been left to develop its meaning on a case-by-case basis. The courts have identified several requirements that a taxpayer must meet to be

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[3] *E.g.*, I.R.C. §§ 62(1) (adjustments to gross income), 162 (trade-or-business expenses), 174 (research expenses), 280A(c)(1) (home-office deductions).

engaged in a "trade or business" for tax purposes, including the requirement that his activities be regular and continuous (*e.g.*, *Stanton* v. *Commissioner*, 399 F.2d 326 (5th Cir. 1968)) and that they be undertaken to make a profit (*e.g.*, *Bessenyey* v. *Commissioner*, 379 F.2d 252 (2d Cir.), cert. denied, 389 U.S. 931 (1967)). Still another requirement —that the taxpayer hold himself out to others as offering goods or services — finds its genesis in Justice Frankfurter's concurring opinion in *Deputy* v. *du Pont*, 308 U.S. 488, 499 (1940). Since then, the goods-or-services requirement has received general acceptance in the lower courts. The Second Circuit observed in *Gajewski* that the words "trade or business" are "commonly viewed as meaning a commercial activity in which a person seeks to earn a livelihood by furnishing goods or services to others for a price" (723 F.2d at 1065-1066 (citing cases)). And the goods-or-services requirement, the court concluded, not only describes "the universal characteristic of a businessman or trader in a free enterprise society," but also offers a standard that is "administratively workable and fair to taxpayers" (*id.* at 1066-1067).

Although this Court has never had occasion explicitly to address the goods-or-services requirement, the Court implicitly approved that formula in *Snow* v. *Commissioner*, 416 U.S. 500 (1974). The question there was the proper construction of Section 174(a)(1), which allows a deduction for research expenses incurred "in connection with [a] trade or business." The Court held that the goods-or-services requirement did not apply to Section 174(a)(1), contrasting it in that respect with Section 162(a), which allows a deduction for expenses incurred "in carrying on any trade or business." The Court noted that Section 162(a) is "more narrowly written" than Section 174(a)(1) — since it

uses the words "in carrying on" rather than "in connection with" — and remarked (416 U.S. at 502-503):

> Section 174 was enacted * * * to dilute some of the conception of "ordinary and necessary" business expenses under § 162(a) * * * adumbrated by Mr. Justice Frankfurter in a concurring opinion in *Deputy* v. *DuPont*, * * * where he said that the section in question * * * "involves holding one's self out to others as engaged in the selling of goods or services."

This case concerns Section 62(1), which, like Section 162(a), requires "carrying on" a trade or business. The goods-or-services requirement was thus properly applied here as a threshold test for determining whether the decedent was so engaged.[4]

2. Contrary to petitioners' contention (Pet. 7-10), the decision below does not conflict with this Court's decision in *Higgins* v. *Commissioner*, 312 U.S. 212 (1941), nor does it reject what petitioners describe (Pet. 8) as the *Higgins* "facts and circumstances test." The question there was whether expenses incurred by an investor in managing a large securities portfolio were deductible as trade-or-business expenses under the predecessor of Section 162(a). This Court held that they were not, reasoning that personal

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[4]There is no merit to petitioners' suggestion (Pet. 14-15) that the Commissioner has taken inconsistent positions about the goods-or-services requirement. In *Steffens* v. *Commissioner*, 707 F.2d 478 (11th Cir. 1983), and *Hornaday* v. *Commissioner*, 81 T.C. 830 (1983), the IRS successfully argued that a consultant was engaged in a "trade or business," and hence was liable for self-employment tax, even though he offered consulting services to only one corporation (707 F.2d at 481-482; 81 T.C. at 833). The Commissioner in those cases did not argue that the goods-or-services requirement could be dispensed with, but that it could be satisfied by the taxpayer's holding himself out as offering services to just one "other." Accord, *e.g.*, *Grosswald* v. *Schweiker*, 653 F.2d 58 (2d Cir. 1981).

portfolio-management is not a "trade or business" regardless of the extent of a taxpayer's wealth or the amount of time expended (312 U.S. at 218). The Court did note in *Higgins* (*id.* at 217) that "[t]o determine whether the activities of a taxpayer are 'carrying on a business' requires an examination of the facts in each case." But the court of appeals here did examine the facts of this case, holding that the decedent was not in a "trade or business" because he bet solely for his own account and did not offer services to others.

As we noted recently in *Moller* v. *United States*, 721 F.2d 810 (Fed. Cir. 1983), cert. denied, No. 83-1485 (June 18, 1984), the so-called "facts and circumstances test" that petitioners and other taxpayers have sought to derive from *Higgins* is not really a test at all, for it embodies no substantive legal standard (83-1485 Br. in Opp. at 12).[5] "It is not enough," the court below noted correctly, "to say that whether a person is engaged in a trade or business is a question of facts or circumstances. The crucial question is *what* facts and circumstances are necessary to [that] determination" (Pet. App. 6-7 (emphasis in original)). Nothing in *Higgins* forecloses the goods-or-services requirement, or any of the other requirements developed by the lower courts, as relevant legal criteria to guide the trier of fact in answering that question.[6]

3. There is likewise no merit to petitioners' suggestion (Pet. 10-14) that the lower courts are in need of guidance on what constitutes a "trade or business" for tax purposes

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[5]A copy of our brief in *Moller* is being sent to petitioners' counsel.

[6]For similar reasons, petitioners err in contending (Pet. 8-9) that the decision below conflicts with *United States* v. *Pyne*, 313 U.S. 127 (1941), and *City Bank Farmers Trust Co.* v. *Commissioner*, 313 U.S. 121 (1941). Those cases, like *Higgins*, involved investment activities, and the Court disposed of them on the basis of *Higgins* (313 U.S. at 126; 313 U.S. at 131).

generally. In determining whether a particular taxpayer is engaged in a "trade or business," the courts have naturally given different weight to different factors depending on the particular situation involved. In the case of securities investors, for example, the courts, drawing on *Higgins*, have focused especially on whether the taxpayer is a "trader" as opposed to a mere "investor." See, *e.g., Moller* v. *United States*, 721 F.2d 810 (Fed. Cir. 1983), cert. denied, No. 83-1485 (June 18, 1984). But as the court below (Pet. App. 7) and other courts (*e.g., Gajewski*, 723 F.2d at 1067 & n.8) have observed, and as we explained in our brief in *Moller* (83-1485 Br. in Opp. at 9-12), these approaches are not inconsistent with one another. They reflect reasoned responses to varied factual situations.

4. The decision below is in accord with *Gajewski* v. *Commissioner*, 723 F.2d 1062 (2d Cir. 1983), cert. denied, No. 83-1715 (Oct. 1, 1984), the only other published appellate decision addressing the question presented here. As petitioners note (Pet. 3-4), the judgment below arguably conflicts with that of the Eleventh Circuit in *Nipper* v. *Commissioner*, 47 T.C.M. (CCH) 136 (1983), aff'd mem., 746 F.2d 813 (1984) (Table), an unpublished order issued after the denial of certiorari in *Gajewski* and before the Sixth Circuit's decision here.[7] In *Nipper*, the Tax Court held that a full-time gambler was engaged in carrying on a trade or business for purposes of the minimum tax on tax preferences, and the Eleventh Circuit affirmed on the basis of the Tax Court's memorandum decision. *Nipper* v. *Commissioner*, No. 84-3067 (Oct. 11, 1984).

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[7]The petitioner in *Gajewski* sought rehearing of the denial of certiorari, alleging a conflict with *Nipper*, but rehearing was denied (No. 83-1715 (Nov. 26, 1984)). The facts involved in the instant case differ somewhat from those involved in *Nipper* and *Gajewski*, since the taxpayer in those cases was a full-time gambler with no other source of income, whereas the decedent here was employed full-time as a parimutuel clerk, and gambled only in his spare moments (Pet. App. 2-3).

In our view, there is no need for this Court to consider the question presented at this time. Absent a published appellate opinion disagreeing with *Gajewski* and the decision below, the case law in this area is not sufficiently developed to warrant this Court's review. The question presented here is now pending in two other circuits,[8] and it will be time enough for the Court to consider the issue when and if a court of appeals renders a published opinion in a taxpayer-gambler's favor.

The importance of the question presented, moreover, has been diminished by subsequent congressional enactment. In 1982, Congress revised the minimum tax law and explicitly provided that gambling losses deductible under Section 165(d) are to excluded from the minimum tax base. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Tit. II, § 201(a), 96 Stat. 411 (currently codified in I.R.C. § 55(b)(1)(B) and (e)(1)(A)). Thus, the narrow question presented here has been resolved legislatively for years beginning after 1982. Although the question whether a gambler is engaged in a "trade or business" continues to be relevant in other tax contexts — *e.g.*, the deductibility of travel or home-office expenses — the revenue impact in those areas is limited, a factor (among others) that led us not to seek certiorari in *Nipper*.

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[8] A district court decision in favor of the Commissioner is on appeal to the Third Circuit in *Noto* v. *United States*, 598 F. Supp. 440 (D.N.J. 1984), appeal pending, No. 84-5704 (argued May 17, 1985), and a Tax Court decision in favor of a taxpayer-gambler is on appeal to the Seventh Circuit in *Groetzinger* v. *Commissioner*, 82 T.C. 793 (1984), appeal pending, No. 84-2507 (argued Apr. 11, 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

JONATHAN S. COHEN
BRUCE R. ELLISEN
Attorneys

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